No. 15080

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. J. STANFILL, as Trustee and ELFRIEDA MAY,
Appellants,

vs.

RALPH B. DEFENBACH, as Trustee,
Appellee.

No. 15080

Appellee's Answer Brief

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JURISDICTION

This action was brought by the Sun Life Assurance Company of Canada as an interpleader action against Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, Elfrieda May, Ralph B. Defenbach as Trustee, E. J. Stanfill as trustee, E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased (Tr. 4-15). The Sun Life Assurance Company of Canada is a Canadian corporation. Mary P. Weyen and her minor children, Daryl Weyen and Carolyn Weyen, are residents of the state of Washington (Tr. 4); Elfrieda May is a resident of Los Angeles, California, and a citizen of the state of California (Tr. 5); Ralph B. Defenbach is a resident of Lewiston, Idaho, and is a citizen of the state of Idaho (Tr. 8); E. J. Stanfill is a resident of Enterprise, Oregon, and is a citizen of the state of Oregon (Tr. 5). The amount in controversy exceeds $500.00 exclusive of interest and costs, to wit the sum of approximately $63,500.00 (Tr. 4-15). Jurisdiction of the District Court exists under the Act of June 25, 1948, Ch. 646 (62 Stat. 930, 28 U.S.C.A. 1332; 62 Stat. 931, 28 U.S.C.A. Sec. 1335; 62 Stat. 936, 28 U.S.C.A. Sec. 1397; 62 Stat. 970, amended May 24, 1949, Ch. 139, Sec. 117, 63 Stat. 105, 28 U.S.C.A. Sec. 2361), and Rule 22 of the Federal Rules of Civil Procedure.

Judgment was entered in favor of appellee against appellants on December 30, 1955. On January 19, 1956, the trial court denied a motion to amend the findings, conclusion, and judgment. The motion and date of filing

said motion does not appear in the record. Notice of Appeal from the judgment and from the order denying motion to amend was served and filed February 15, 1956. Jurisdiction, if any, of the United States Court of Appeals for the Ninth Circuit to review the case exists under Act of June 25, 1948, Ch. 646; 62 Stat. 929, 28 U.S.C.A. Section 1291; and 62 Stat. 930, 28 U.S.C.A. 1294; and Rule 73 of the Federal Rules of Civil Procedure. The record does not establish the jurisdiction of this Court to review the judgment of the District Court.

In the event it is determined that this Court does have jurisdiction, appellee presents its statement of the case and argument on the merits.

COUNTER-STATEMENT OF THE CASE

This is an interpleader action in which the plaintiff, Sun Life Assurance Company of Canada, a corporation, has deposited in the registry of the court the net proceeds of eight insurance policies on the life of Robert F. Weyen, who died on April 16, 1955. Several rival claimants to such proceeds have been impleaded as defendants (Tr. 3-15).

On September 22, 1953, the assured, Robert F. Weyen, a resident of Asotin County, Washington, secured a decree of divorce in the Superior Court of that county from his wife, Mary P. Weyen, who was awarded the custody of the two minor children of the parties, Daryl Weyen and Carolyn Weyen. The father was required to pay $200 a month for their support during their minor-

ity, and the insurance policies in suit in accordance with the property settlement agreement entered into between the parties were awarded to the assured, Robert F. Weyen (Tr. 76).

On the next day following the entry of the divorce decree, Robert F. Weyen executed a trust agreement or declaration of trust in which he named his attorney, defendant E. J. Stanfill, as trustee, and stated that he had designated the trustee as beneficiary in ten life insurance policies. Seven of the policies are involved in the present action and three were issued by insurance companies other than the plaintiff. The policies constituted the corpus of the trust. The trust was to continue for a period of fifteen years and the beneficiaries were the two minor children of Robert F. Weyen. The trust instrument provided that in case of the death of Robert F. Weyen during the trust period, the trustee should collect the proceeds of the life insurance policies and use them for the education, maintenance, and support of the minor children.

The trust agreement contained the following provision:

> "The donor specifically reserves the right during the term of this trust to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies; and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the trustee named herein shall not be required to join in the application for said loans." (Tr. 24-25, 77)

On the same day, September 23, 1953, Robert F. Weyen executed a Last Will and Testament in which he stated

that he had made no provisions for his minor children because

> "I have heretofore provided for them through insurance policies on my life; however, should said policies lapse or become null and void, I hereby give, devise, and bequeath to my said children the sum of $10,000, share and share alike." (Tr. 27, 77)

On November 16, 1954, Robert F. Weyen executed an assignment to a trustee for benefit of his creditors. In that document he stated he was in financial difficulties and unable to pay his debts; that he assigned all his property, assets, and income to defendant Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment, including all but one of the life insurance policies which are the subject of the present action. (Tr. 33-55, 77-78)

The paragraph of the assignment in which the life insurance policies were listed recited that Robert F. Weyen, the assignor, had prepared the necessary documents to have Ralph E. Defenbach made his beneficiary for the benefit of creditors "joining in this assignment" in the event of his death, and the assignor undertook immediately to deliver the policies to Defenbach for forwarding to the home offices of the companies issuing said policies so that appropriate endorsements may be attached thereto showing Defenbach as beneficiary thereunder. (Tr. 40-41) The instrument further stated that this assignment shall constitute a mortgage upon all the property listed herein .(Tr. 44)

At the time of his death, the total amount of Weyen's debts covered by his assignment for the benefit of his creditors greatly exceeded the total net proceeds of his life insurance policies (Tr. 198). One insurance policy which was initially assigned to Stanfill as trustee was later assigned to Elfrieda May. This policy was awarded to Stanfill. This part of the judgment is not an issue.

SUMMARY OF ARGUMENT

The sole question involved in this case is the interpretation of the provision of the trust agreement quoted above, and whether the Stanfill agreement deprived the assured, Robert F. Weyen, of the right to change the beneficiary in view of the fact that specifically in the agreement itself he reserved the right to pledge the policies as collateral security for the payment of his debts.

Robert Weyen clearly intended by the quoted provision of the Stanfill trust agreement to retain the life insurance policies as a credit reserve to be used in connection with his business. In assigning the policies to appellee as trustee for the benefit of creditors, he clearly was using the policies in a manner intended by the reservation. An assignment or pledge of an insurance policy for the purpose of securing a debt clearly carries with it the right of the creditor to receive the proceeds of the policy upon the death of the assured to the extent of the debt outstanding, which in this case happens to be the full amount of the policies.

Appellants make no objection to the Findings of Fact I-V, most of the Finding of Fact No. VI, with the

exception of part of the next-to-last sentence; take no exception to Finding of Fact No. VII, the first sentence of Finding No. VIII, nor to Finding No. IX and X. (App. Br. 11 and 12). Under Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18 Subsec. 1 (d), Appellants are required to specify as particularly as may be wherein Findings of Fact and conclusions of law are alleged to be erroneous.

The findings to which no exception is taken wholly support the judgment and the findings specified as error by appellants are fully supported by the record.

ARGUMENT

The question presented for determination is whether the defendant, E. J. Stanfill, as trustee in the trust agreement of September 23, 1953, or defendant Ralph B. Defenbach as trustee under the assignment for benefit of creditors of November 16, 1954, is entitled to the proceeds of the life insurance policies which are listed in and covered by both instruments.

Appellants admit that under the contract between the insurance company and Weyen, Weyen had reserved the right to assign or pledge every right conferred by the policy (App. Br. 16). The sole question is whether he had estopped himself from making an assignment which would in effect change the beneficiary of the policy by executing the Stanfill trust. It is difficult to understand appellant's position in view of the specific provision in the trust agreement (Paragraph 7 of the Trust Agreement) which reads as follows:

"The donor specifically reserves the right during the terms of this trust to pledge any of such policies as collateral, or to exercise the loan rights as provided in said policies; and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the trustee named herein shall not be required to join in the application for said loans."

It would seem that there is little room for interpretation of such a provision; however, if there was any room for interpretation, the Washington Supreme Court has decided that question very definitely and decisively for the state of Washington, when it said:

"It seems to be the general rule that when the policy by its language recognizes the right of the assured to assign it, and when the assured may change the beneficiary, one to whom it has been assigned as security for a debt will be held to have a prior right to so much of the proceeds as may be required to discharge the debt secured (citing cases).

"It is a universally recognized rule that where the right to change the beneficiary is reserved to the assured, no beneficiary acquires a vested interest in the policy (citing cases).

"In these modern, complex times, the right of every man to use his accumulations to pay his debts, especially when he has pledged them to obtain liquid capital, ought not to be limited or abridged except only in those instances where by his own act he has barred his own right of control by creating an irrevocable vested interest in another or others. Life insurance during the life of the assured forms a reserve to be drawn upon in times of stress, and many have improved their fortunes and bettered the condition of their dependents by drawing liquid capital from that source to enable them to maintain or renew their business activities."

Massachusetts Mutual Life Insurance Co. v. Bank of California, 187 Wash. 565, 570, 60 P. 2d 675

As the Honorable District Court stated in its opinion in this case:

> "When he got into serious financial difficulties in November of 1954, Weyen took advantage of the reservation he had made in his declaration of trust and, in effect, pledged the life insurance policies as collateral security for the payment of his debts. It was not necessary for him to change the beneficiary in order to accomplish that purpose. Indeed, if he had gone through all the forms of changing the beneficiary, or had undertaken to make a complete and unconditional assignment of his life insurance, it would have been regarded in legal affect as an assignment or pledging for security, as that plainly appeared to be the intention of the parties. There can be no doubt from consideration of the entire instrument of assignment for creditors that Weyen did not intend to make defendant Defenbach, his trustee, the unconditional beneficiary of his life insurance or to convey unconditionally to such trustee all of his property, but intended rather to pledge his assets, including his life insurance, as security for the payment of his debts." (Tr. 70-71)

Appellants in their brief seem to recognize that Weyen did retain the right to pledge the insurance policies as collateral, but they attempt to make two reservations: (1) That this reservation allowed Weyen to pledge the insurance policies only to the extent that they were generally in the market considered liquid capital or to the extent of their cash surrender value. (2) That the word "or" between the clauses "to pledge any of such policies as collateral" and the clause "to exercise the loan rights as provided in said policies," should be

construed as creating an alternative right so that once the policies had been used to secure a loan from the insurance company, they could not thereafter be pledged for any further debts.

The first argument is entirely unsound because it attempts to write into the agreement something that is not there. Appellants state on Page 14 of their brief that "Loans on policies as a practical matter are limited to cash surrender value." As a matter of fact, it will be found that generally speaking, loans are limited to the cash surrender value less one year's premiums. In effect, appellants are asking the court to write into the reservation in Paragraph 7 of the trust agreement the words "to the extent of their cash surrender value or, in the alternative, to the extent of their loan value." The law is well settled that the courts will not make a new contract or rewrite a contract which the parties did not make. As stated by the Supreme Court of Washington:

> "Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves. *Chaffe v. Chaffe,* 19 Wash. 2d 607, 145 P. 2d 244."
>
> *Clements vs. Olsen,* 46 Wash. 2d 445, 448, 282 P. 2d 266.

Chaffee v. Chaffee, 19 Wash. 2d 607, 145 P. 2d 244, also states the general rule, at page 625, quoting from 12 Am. Jur. 749, Contracts, Sec. 228, as follows:

> "Interpretation of an agreement does not include its modification or the creation of a new and different one. A court is not at liberty to revise an agreement while professing to construe it, nor does it

> have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves, or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make, or rewrite contracts because they operate harshly or inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of public policy and contains no element of ambiguity, the courts have no right, by a process of interpretation, to relieve one of them from disadvantageous terms which he has actually made."

It is also basic law that in the construction of contracts, the intention of the parties to the agreement must control. When the intent of the parties is clearly evident, as in this case, the courts have nothing to construe and must be governed by the intentions of the parties as expressed in the written instrument.

> *Silen v. Silen,* 44 Wash. 2d 884, 271 P. 2d 674; *Thomle v. Soundview Pulp Co.,* 181 Wash. 1, 42 P. 2d 19; *E. H. Stanton Co. v. Rochester Agency,* 206 F. 978; *Pitcairn v. American Co.,* 101 F. 2d 929.

It is also a basic rule that the first and best resort in the construction of contracts is to put oneself in the place of the parties at the time the contract is executed, to look at it in prospect rather than retrospect.

> *Long-Bell Lumber Co. v. National Bank of Commerce,* 35 Wash. 2d 522, 214 P. 2d 183.

It seems clear that when Robert Weyen entered into the Stanfill trust agreement, he intended to retain con-

trol over the insurance policies to the extent that it was necessary to use them in securing credit; that he had in mind, in view of the nature of his business as a large-scale logging contractor, which is stated by the District Court as

> "Not generally regarded as one of the more stable forms of business activity," (Tr. 70)

that he obviously wished to reserve his life insurance as a useful credit resource.

Surely appellants cannot mean to contend that upon Weyen's death the pledge that he may have made of the insurance policies would become void and that the pledgee would lose his security and lose the entire amount of his loan. On the contrary, they have tacitly admitted that the insurance company had the right to withhold part of the proceeds of the policies to repay the loans to themselves, and tacitly admit that had Weyen pledged the policies to a bank or other lending institution to the amount of the cash surrender value or whatever amount he could secure from the bank on such collateral, such loan would have priority over the Stanfill trust as beneficiary under the designation at the time the Stanfill trust was executed. The right to pledge policies without the right of the pledgee to recover upon the death of the pledgor in the amount of any loan extended to him would, of course, be valueless and it could not be assumed that Weyen intended to reserve to himself a right which would be of no value.

Appellants make much of the fact that Weyen executed a will at the same time that he executed the Stan-

fill trust. The provisions of the will appear to weaken their contention rather than to strengthen it. As a matter of fact, the will specifically contemplates that the insurance policies might lapse and become null and void for any number of reasons. (Tr. 27, 77). The so-called insurance trust is not a funded trust of any kind; it could lapse or fail because of the failure to pay premiums; and likewise it could lapse or fail because the insurance policies might be used as collateral security to secure a debt, which in fact happened.

The inconsistency of appellant's position in this case can be further demonstrated by assuming that Weyen may have pledged the insurance policies along with a considerable amount of machinery for a single debt, without specific reference to the amount which each piece of property or each insurance policy was pledged. If we assume for one reason or another the machinery depreciated in value considerably and upon Weyen's death the machinery plus the cash surrender value of the policies was not sufficient to pay off the debt, would it be contended that the rights of the lender in this case would be restricted to the cash surrender value of the policies? Such an interpretation runs far afield from the province of interpretation and far into the field of writing a new contract for the parties.

Appellants' contention that the word "or" in the reservation in Paragraph 7 of the trust agreement left Weyen only an alternative is also unsound (Appellants' Brief 23). Appellants cite the 1956 supplement to *Words and Phrases*. There are slightly over two pages

of cases cited where "or" is construed as being the alternative, and there are over three pages of cases where "or" is construed as "and."

30 Words and Phrases 1956 Supp. P. 16-22

There are also many pages in the main volume of *30 Words and Phrases* citing cases construing the word as both "and" and as an alternative.

30 Words and Phrases P. 69, et seq.

It would neither be possible nor profitable to analyze each of these cases.

There is one thing all the cases have in common: That is, that the word "or" is construed as "and" or as indicating an alternative, whichever appears to carry into effect the intention of the parties. Under the circumstances involved in the instant case, it seems to be completely unreasonable to assume that Weyen intended to restrict himself in the manner suggested by appellants.

In addition, it should be pointed out that appellants' specifications of error, as compared with the arguments made in their brief, create a very confusing situation. No exception was taken to the part of finding of fact No. 6 which stated that:

> "Prior to November 16, 1954, Robert F. Weyen had become involved in financial difficulties, was unable to pay his debts, and that on November 16, 1954, he executed an assignment to Ralph B. Defenbach as trustee for the benefit of his creditors. In that document he assigned all his property, assets,

and income to Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment, and said assignment included all by (sic) one of the life insurance policies which are the subject of the present action.

"In this manner said policies were pledged to defendant Ralph B. Defenbach as trustee for the creditors of Robert F. Weyen."

Also, no exception was taken to Finding No. VII, which reads as follows:

"By its terms the Stanfill trust specifically reserved the right to the donor, Robert F. Weyen, to exercise the loan rights as provided in the policies of insurance and 'to pledge any of such policies as collateral'; that this trust agreement was drafted by a lawyer and the right to pledge as collateral was reserved to the donor by means of putting up the policies as security for a debt additional to the personal obligations of the debtor. The right reserved to pledge the insurance policies as collateral applied to security for the payment of debts, whether they be antecedent or newly created."

Part of Paragraph VIII, to which no exception was taken, reads as follows:

"When Robert F. Weyen got into serious financial difficulties in November of 1954, he took advantage of the reservation he had made in his declaration of trust and did pledge the life insurance policies as collateral security for the payment of his debts." (Tr. 77-79) (App. Br. 11-12)

Since no exception was taken to these findings of fact in the specifications of error, objections to these findings are waived.

Rule 18—1(d)—Rule of Court of Appeals for Ninth Circuit

Gelberg v. Richardson, 82 F. 2d 314
Gripton v. Richardson, 82 F. 2d 313
Berry v. Earling, 82 F. 2d 317
Barnett v. U. S., 82 F. 2d 765
Hultman v. Tevis, 82 F. 2d 940
Reuter v. McCook, 92 F. 2d 267

Since the Stanfill trust specifically reserved the right to Weyen to exercise the loan rights and to pledge any of such policies as collateral, and the right reserved to pledge the insurance policies as collateral applied to security for the payment of debts whether they be antecedent or newly created, and since Robert Weyen did pledge the life insurance policies as collateral security for the payment of his debts, and since it is definitely settled under the law of Washington that one to whom an insurance policy has been assigned as security for a debt will be held to have a prior right to so much of the proceeds as may be required to discharge the debt secured (*Mass, etc. Co. v. Bank of California,* 187 Wash. 565, 60 P. 2d 675) ; the conclusions of law and the judgment could not do otherwise than award the proceeds of the policies to the appellee, to whom these policies had been pledged.

The Specification of Error No. 1 quotes:

> "the necessary documents were prepared and the assignor delivered the policies to Defenbach for forwarding to the home office of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary." (Appellants' Br. 11)

Appellants make little or no reference to specification of error No. 1 with the exception that on page 17 of their brief, they state that Weyen used the company form in naming Stanfill as trustee but did not do so as to Defenbach. Such a discrepancy would be immaterial, inasmuch as the law is well settled that where an assured has the right to assign the policy, he may do so without complying with the provisions of the policy prescribing the manner of changing the beneficiary. Upon the death of the assured the assignee is entitled to the proceeds of the policy to the extent of his interests as against the beneficiary.

> *Mass., etc. Co. v. Bank of California,* 187 Wash. 565, 60 P. 2d 675;
> 135 A.L.R. 1040 (n)

Specification of Error No. 2 is similar and is answered by the same authorities.

Specifications of Error No. 3, 4, 5, 6, and 7 relate merely to the conclusions to be drawn from the facts that have been previously answered. (Appellants' Br. 11-12)

Specification of Error No. 8, reads as follows:

> "The Court erred in refusing to allow Elfrieda May and E. J. Stanfill as Trustee the $3,000 paid to Weyen's creditors to enable them to obtain the Defenbach agreement." (App. Br. 12)

Appellants treat this specification in a very offhand manner and cite one decision of an intermediate Tennessee court. This case is not in point, since it involves

a constructive trust imposed on proceeds of a policy purchased with misappropriated funds. Testimony with relation to this claim is very brief and very general, and to the effect that Elfrieda May put up something in the neighborhood of $3,000, which was apparently used to make payments due Mrs. Weyen, Weyen's divorced wife, under the divorce decree.

What Mrs. May's position might be in the assignment proceeding and what her priorities might be are matters which could be determined only in connection with the settlement of the Defenbach trusteeship and are matters which involve the remaining creditors. There is no authority or reason for settling such a claim in this proceeding.

See *Spring and Sons v. South Carolina Insurance Co.*, 8 Wheat. (U. S.) 268, 5 L. Ed. 614.

CONCLUSION

Both at law and in equity the creditors of Robert Weyen are entitled to the proceeds of the insurance policies in dispute. Weyen clearly and uncontrovertably retained the right to use these insurance policies for the purpose of procuring credit or assisting him in his business. This he did. His creditors were in a position at the time of the assignment for the benefit of creditors to put him out of business, to bring suits against him and secure judgment, to throw him into bankruptcy. Instead, they were willing to accept his pledge of all his assets and the management of his affairs by the assignee

for the benefit of creditors. He thus secured a stay and an opportunity to extricate himself from his difficulties, and the creditors lost their opportunity to realize on whatever assets he had at that time. Those assets were subsequently lost; and if the proceeds of the insurance policies are also lost to them, they will have given up their rights and secured nothing in return.

Assignments for the benefit of creditors are construed liberally and favorably in favor of the creditors and assignee for benefit of creditors.

> 4 *Am. Jur.* 339, *Assignments for Benefit of Creditors, Sec.* 2.

It is true that the children are also entitled to consideration. However, the courts are not justified in determining this matter on the basis of which of the interested parties is the most deserving of consideration. There seems to have been no doubt in anyone's mind prior to the death of Robert Weyen that he had retained the right to pledge these policies to the assignee for benefit of creditors as part of his assets.

We respectfully submit that there is no justification for following the suggestion of appellants that the court write an additional clause into the Stanfill trust restricting Weyen's right to pledge the insurance policies up to the cash surrender value and no further.

Respectfully submitted,

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